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IN THE

Supreme Court of the United States

October Term, 1935

No. 195

UNITED STATES OF AMERICA

Petitioner

v.

BANK OF NEW YORK AND TRUST COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Report of Opinions Below

The opinion of the District Court (R. 164) is reported in 10 Fed. Supp. 269; the opinions of the Circuit Court of Appeals (R. 185) have not yet been reported.

Questions Presented

The case below presented the following questions:

1. Whether the District Court had jurisdiction of the cause of action asserted by petitioner, the N. Y. state

courts having assumed jurisdiction and actual or constructive possession of the funds in controversy long prior to the bringing of the instant suit.

2. Whether the federal courts will give extraterritorial effect to the Soviet decrees of confiscation over property situated within a state of the United States, and especially where the highest court of the state where such property has always been situated has denied extraterritorial effect to such Soviet decrees as contrary to its public policy.

3. Whether, by the diplomatic proceedings of November 16, 1933, between the President and the representative of the Soviet government, the title to the property here in question has been validly assigned to and accepted by the petitioner.

4. Whether the complaint, in any aspect, sets forth a cause of action in equity cognizable in a federal court against the respondent, a mere bailee.

The Decisions Below

The Circuit Court of Appeals, by a majority, has decided question 1 in the negative. The District Court has decided questions 2 and 3 in the negative. The dissenting opinion in the Circuit Court of Appeals would answer all three questions in the affirmative. Question 4 has not been decided by either of the courts below.

The opinion of the dissenting judge of the Circuit Court of Appeals is based entirely upon his present view

that the Soviet decrees of confiscation, by virtue of our recognition of Soviet Russia, retroactively and extraterritorially vested the Soviet government with title to the assets of United States branches of Russian corporations, although such assets were never within the territorial jurisdiction of Russia but had always been located within the territorial jurisdiction of the State of New York (R. 202-205). Such views are directly contrary to the previously expressed views of the same judge (*Lehigh Valley R. Co.* v. *State of Russia,* 21 Fed. (2d) 396, 401; certiorari denied, 275 U. S. 571) where, speaking for the entire court, he said: "It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition. Acts theretofore performed outside of its own territory cannot be validated by recognition."

Statement

Long prior to the time when the instant suit was commenced (August 22, 1934), the fund which the complaint herein sought to obtain had been taken into the custody of the Supreme Court of the State of New York, and at the time of the beginning of such suit such fund was still in the control of such state court in liquidation proceedings and proceedings supplementary thereto, the object of which was to determine the disposition of such fund (R. 6, 22, 50, 74, 78, 99-104) in the manner directed by the highest court of the state, speaking by Chief Judge Cardozo (*Matter of People—Moscow Fire Ins. Co.*, 255 N. Y. 433; R. 50, 22-34). The fund had been first taken into the actual possession of the state court through the medium of the appointment of the Superintendent of

Insurance as liquidator of the property in the state of Moscow Fire Insurance Company, a former Russian corporation, pursuant to state statute (*N. Y. Ins. Law*, sec. 63, subd. 5), in a proceeding in the state court for such purpose (R. 50, 99). In the course of such proceeding, the New York court of appeals in February 1931 directed that the surplus assets of the United States branch of the Moscow Company, remaining after payment of all just claims, either filed with the Superintendent of Insurance or prosecuted by attachment, should be paid to Paul Lucke, the sole surviving director of the company, as conservator of the property of the company, upon condition that he file a bond conditioned that he would faithfully apply the assets to the use of the creditors and shareholders of the Moscow Company. As an alternative to the giving of the bond, it was further provided in the decision of the Court of Appeals and in the order of the Supreme Court on remittitur from the Court of Appeals that, upon the election of the Moscow Company and its surviving director and conservator, the surplus funds should be released, paid, transferred and delivered to the respondent herein, as agent or depositary of the Moscow Company and of Paul Lucke, as surviving director and conservator, upon the filing of a written stipulation of the Moscow Company and of Paul Lucke as such surviving director and conservator that the surplus assets or fund would not be withdrawn except upon the order of a court of competent jurisdiction (R. 52-55, 99-101; *Matter of People, etc.*, 255 N. Y. 433; also related case of *Matter of People, etc.*, 255 N. Y. 415). Pursuant to the order of the New York Supreme Court (R. 50) entered as directed by the New York Court of Appeals (*supra*) in

such proceeding, such fund was deposited on April 18, 1933, with the respondent bank as the agent or depositary of the Moscow Company and of Paul Lucke as surviving director and conservator thereof by the New York Superintendent of Insurance as liquidator, on condition as directed by such order, that such fund was not to be withdrawn except upon the order of a court of competent jurisdiction (R. 55). Immediately thereafter, on April 19, 1933, there was begun in the New York Supreme Court a supplementary suit, the object of which was to determine the disposition of such fund (R. 22-34). Such supplementary suit had proceeded to judgment on the very day (August 22, 1934) the instant suit was brought (R. 78, 103).

The instant suit was brought by petitioner as alleged assignee of the alleged title of the Soviet Republic under its decrees of confiscation to recover the whole of the funds in the control of the state court, although the instant complaint is dressed up to look like a suit in personam. With the exception of the order of the state court entered on remittitur from the Court of Appeals, as above mentioned, the instant complaint studiously omits reference to the state court's acquired control of the funds although there was inserted in the complainant's affidavit for injunction the summons and complaint in the supplementary liquidation proceedings in the state court (R. 15, 22-34).

Although probably immaterial, there is no justification for petitioner's statement on page 5 of the petition to the effect that the petitioner filed its bill of complaint herein prior to the entry of the above mentioned judgment of the state court. Such judgment was entered and the instant suit commenced on the same day. The record does not

indicate the hour of the day in either case, but it does appear that the subpoena herein was not served upon the respondent bank until the day following, August 23rd (R. 1).

During the period of such extensive proceedings in the courts of the state of New York to liquidate the fund and distribute it according to its laws, the highest court of the state repeatedly held, subsequent to recognition as well as before, that these very confiscatory Soviet decrees upon which petitioner relies were contrary to the public policy of the State of New York, shocking to its sense of justice, and would not be enforced in its courts; and that by the decrees relied upon by the petitioner the Soviet government acquired no title to any such assets in the State of New York of the former Russian corporations (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co.*, 263 N. Y. 369, 378-379; *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, 90, 108-109; *James* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 257.

That the Soviet decrees are confiscatory in their nature is specifically alleged in the complaint (R. 5); is shown by the decrees themselves (R. 63, 65); and is so held by all the opinions below (R. 168, 185, 204). The petition, however, studiously omits reference to the Soviet decrees as decrees of confiscation, but speaks of them merely as decrees of appropriation.

ARGUMENT

1

Jurisdiction

The first state court proceeding, in which the Superintendent of Insurance was the statutory liquidator of the Moscow Fire Insurance Company, was clearly a proceeding in rem. The subsequent and supplemental suit in the state court, instituted in the name of the Moscow Company and its surviving director Paul Lucke as conservator, pursuant to the direction of the highest state court in the first proceeding, for the purpose of obtaining a judicial determination of the disposition to be made of the surplus funds and securities then in the custody of the respondent as bailee, was likewise a proceeding in rem. (*Kline* v. *Burke Construction Company*, 260 U. S. 226, 231). The instant suit, brought long subsequent to the institution of the state court proceedings for the purpose of asserting a claim to the whole of the funds in the custody of the state court, is likewise in rem, or quasi in rem. Under these circumstances, the Federal District Court was without any jurisdiction at all (*Penn General Casualty Company* v. *Pennsylvania ex rel. Schnader*, 294 U. S. 189). Especially is this so since the claim of the petitioner was actually filed (R. 105, 155) in the state court proceeding, although not there pressed (*Peoples Trust Company* v. *U. S.*, 23 Fed. (2d) 381; *Merryweather* v. *United States*, 12 Fed. (2d) 407; *United States* v. *American Ditch Association*, 2 Fed. Supp. 867). Even if the District Court had had jurisdiction, such jurisdiction

should be relinquished to the state court (*Penn General Casualty Company* v. *Pennsylvania ex rel. Schnader, supra*).

The state court having first taken jurisdiction over the *res*, the District Court clearly has no jurisdiction over the *res* or to direct the respondent to account (*Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, 44-46). The instant complaint does not and cannot seek to establish any personal liability against the respondent, a mere custodian. Consequently, there is no right in personam which can be determined and enforced in the instant suit within the principles set forth in the *Waterman* case.

The jurisdiction of the federal courts in cases wherein the United States is a party, is not an exclusive jurisdiction, and consequently the state court had undoubted jurisdiction to determine the claim of the United States as actually filed in the state court proceedings but not pressed therein. (*Cotton* v. *United States*, 11 How. 229, 231; *Claflin* v. *Houseman*, 93 U. S. 130, 136; *Peoples Trust Co.* v. *United States*, 23 Fed. (2d) 381; *Merryweather* v. *United States*, 12 Fed. (2d) 407.)

The state court having acquired control of the *res* and having assumed jurisdiction to administer it, the United States, like any other party litigant, is bound by the numerous decisions of this Court to the effect that the jurisdiction of the court first in control will be protected. That the United States as a party litigant in commercial matters is bound by the rules governing other litigants, has frequently been decided by this Court (*Standard Oil Company* v. *United States*, 267 U. S. 76; *United States* v. *The Thekla*, 266 U. S. 328; *Chesapeake & Delaware Canal Co.* v. *United States*, 250 U. S. 123, 126; *Cooke* v. *United States*, 91 U. S. 389, 398).

In support of its contention that the District Court had jurisdiction of the instant suit notwithstanding the prior pendency of the state court proceedings, the petitioner cites only two District Court decisions, neither of which, it is submitted, have any application to the situation in the instant case. In the case of *U. S.* v. *McIntosh,* 57 Fed. (2d) 573, relied upon by the petitioner, it appears that the United States was acting in its sovereign capacity as the owner and operator of a marine base which it had purchased pursuant to an Act of Congress, and that the State of Virginia, in which the premises were located, had relinquished to the United States all jurisdiction over the premises in question. Likewise, in the case of *United States* v. *Inaba,* 291 Fed. 416, relied upon by petitioner, the United States was also acting in a sovereign capacity as trustee for its Indian wards. In cases involving lands allotted to the Indians, the jurisdiction of the federal courts has always been paramount.

The case of *United States* v. *Lee,* 106 U. S. 196, relied upon by the petitioner, is not concerned in any respect with questions of conflicts of jurisdiction between the state and federal courts.

The case of *Riehle* v. *Margolies,* 279 U. S. 218, further relied upon by the petitioner, has no application for the reason, as hereinbefore pointed out, that the petitioner in the instant case is not seeking to recover and cannot recover a personal judgment against the respondent. Moreover, in the *Riehle* case, the state court suit was commenced prior to the institution of the receivership proceedings in the federal court, and all that this Court decided was that the creditor had a right to prosecute to judgment such suit against the debtor in personam.

2

Confiscation and Public Policy

The funds in question being within the State of New York and the highest court of the state having declared the admittedly confiscatory decrees of the Soviet government to be against its public policy and unenforcible in its courts (see Statement): under such circumstances the duty of the Federal District Court in New York is simply to administer the law of the State of New York as so declared by its highest court, and the district court is without power to review the holding of the state court or to enforce such Soviet decrees over property within the State of New York (*Clark* v. *Williard,* 294 U. S. 211; 213; *Same* v. *Same,* 292 U. S. 112, 123; *City Bank Co.* v. *Schnader,* 293 U. S. 112, 118-119; *Burnet* v. *Brooks,* 288 U. S. 378, 399; *Pennoyer* v. *Neff,* 95 U. S. 714, 722).

But irrespective of the foregoing, the Soviet decrees of confiscation are contrary to the public policy of the United States, and the federal courts will not enforce such decrees over property within the jurisdiction of our courts and which has always been located here (*5th Amendment; Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 491-492; *Baglin* v. *Cusenier,* 221 U. S. 580; *Bank of Augusta* v. *Earle,* 13 Pet. 519, 589; *Second Russian Ins. Co.* v. *Miller,* 268 U. S. 552, 560).

No case has been cited nor can be cited where any court of this country has upheld a title based on confiscation except a case—not such as the instant case—where the property confiscated was within the territorial jurisdiction of the confiscating government.

Recognition, even if coupled with the alleged acceptance by the President of an assignment of all Russian governmental claims to property in the United States, did not authoritatively determine that the Soviet confiscation decrees were not against the public policy of the United States. The Executive act represented by the acceptance of the "Litvinoff" assignment, even if regarded as an act within the treaty power, does not determine public policy contrary to express prohibitions of the Constitution (*Geofroy* v. *Riggs*, 133 U. S. 258, 267; *The Cherokee Tobacco*, 11 Wall. 616, 620-621). The Executive, having no authority in peace or war (*Brown* v. *United States*, 8 Cranch 110; *Miller* v. *United States*, 11 Wall. 268, 310) to confiscate property, it follows that the Executive has no power by indirection to override our public policy by an alleged acceptance of title to property in the United States based upon the confiscatory decrees of a foreign government. The question of public policy in such a case as this is for the courts, not the Executive.

While our courts, in cases which do not violate our public policy, usually recognize the transfer of title to personal property according to the law of the domicile, and while the legal relations of the members of a corporation to the corporation and to each other are regulated and controlled by the law of the jurisdiction in which the corporation is organized (*Second Russian Ins. Co.* v. *Miller*, 268 U. S. 552, 560), nevertheless such rules of comity or of necessity can have no application over property within our jurisdiction where the alleged transfer at the domicile is by confiscation or other method in violation of our public policy as declared in our fundamental law. And so in the case of *Canada Southern*

R. Co. v. *Gebhard* (109 U. S. 527; see *Second Russian Ins. Co.* v. *Miller, supra*), so much relied on by petitioner in the courts below, this Court, while recognizing the application of the law of the corporation's alien domicile to bonds of the corporation held in the United States, was careful to point out that such law was in harmony with the spirit of our own bankruptcy and foreclosure laws, and so not opposed to our public policy.

The fact that by the Soviet decrees Russian insurance corporations were nationalized and liquidated has nothing whatever to do with the question of petitioner's alleged title to the funds in question. At most the Soviet Republic became the statutory successor of the nationalized Russian corporations. As such statutory successor it could obtain no title to corporate assets located in the United States contrary to the law and public policy of the sovereignty having physical control of such assets (*Clark* v. *Williard*, 294 U. S. 211).

3

The "Litvinoff" Assignment

If the Soviet government obtained no title by its decrees of confiscation which our courts will enforce, then of course the assignment is inoperative (*United States* v. *Buford*, 3 Pet. 12, 30).

But beyond this, the title asserted to this property can not be said to have been accepted by petitioner through the act of the President. In the case of diplomatic assignments affecting non-enemy nationals, private property of nationals of the assignor government always will be recog-

nized and protected (*U. S.* v. *Percheman*, 7 Pet. 51, 86-87; *Strother* v. *Lucas*, 12 Pet. 410, 438; *Coffee* v. *Groover*, 123 U. S. 1, 9; *Kinkead* v. *U. S.*, 150 U. S. 483). Treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals (*Sullivan* v. *Kidd*, 254 U. S. 433, 439), and it is expected that their provisions will be expressed in unmistakable terms (*Rocca* v. *Thompson*, 223 U. S. 317, 332).

The assignment undoubtedly covered amounts due the Soviet government as the successor of prior governments of Russia. Contrary to the assertion of the petitioner, this was all that was held in the case of *State of Russia* v. *National City Bank*, 69 Fed. (2d) 44. But petitioner claimed in the courts below that the additional words "or otherwise" (R. 42, 44) include the claim in suit. If this be so then a claim of any kind, however based upon any one of the many, unique shall we say, decrees of the Soviet government, is to be deemed to have been accepted by the petitioner as a collection agent, with the consequent responsibilities and liabilities. The assignment should not be so construed (see opinion of District Court, R. 171-172). In the aspect most favorable to the petitioner such assignment is ambiguous, and no such extensive liabilities should be founded upon such ambiguity in view of the principles laid down by this court as above indicated.

4

The complaint fails to state a cause of action in equity.

The allegation that the funds were delivered to the respondent "as agent or depositary of the Moscow Fire

Insurance Company, said fund not to be withdrawn except upon an order of a court of competent jurisdiction" (R. 6) does not show such an express or implied trust relation between the respondent and the Moscow Company as to confer jurisdiction upon a court of equity (*Young* v. *Mercantile Trust Co.*, 140 Fed. 61; aff'd 145 Fed. 39, 2d Circ.; *Tuckerman* v. *Mearns*, 262 Fed. 607, 610; *Adams* v. *Jones*, 11 F. (2d) 759, 760; certiorari denied, 271 U. S. 685). Respondent is a mere bailee.

CONCLUSION

The principles of law applicable to this litigation and applied by the courts below have long been well settled. The record raises no question of merit deserving of review on certiorari.

Respectfully submitted,

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July, 1935.